

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34427

KEVIN C. SAGIAO,)	2009 Unpublished Opinion No. 462
)	
Petitioner-Appellant,)	Filed: May 13, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Order of the district court denying application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Kevin C. Sagiao appeals from the district court's order denying his application for post-conviction relief. He contends that the district court abused its discretion in denying his motion to amend his complaint to conform to the evidence at trial. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Kevin Sagiao was convicted of possession of a controlled substance, Idaho Code § 37-2732, and was sentenced to two years with one year determinate. He filed a pro se application for post-conviction relief on February 13, 2003, alleging several errors including ineffective assistance of counsel. He was appointed counsel and subsequently amended his application twice, again asserting claims of ineffective assistance of counsel.

The district court held an evidentiary hearing on the application for post-conviction relief on June 27, 2007. At the hearing, Sagiao's counsel moved to allow amendment of the pleadings

to add ineffective assistance of counsel claims for failure to file an appeal and a Rule 35 motion, based upon testimony elicited at the hearing. The court denied the motion. Sagiao's application was subsequently denied. Sagiao appeals claiming that the district court should have granted his motion to amend his application to assert a claim of ineffective assistance of counsel for failure to file an appeal.¹

II. ANALYSIS

Post-conviction applications are governed by the Idaho Rules of Civil Procedure. *Dunlap v. State*, 141 Idaho 50, 57, 106 P.3d 376, 383 (2004); *Cole v. State*, 135 Idaho 107, 110, 15 P.3d 820, 823 (2000). I.R.C.P. 15(b) provides:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

While amendments to pleadings should be liberally allowed, the ruling of a district court will not be overturned absent a showing of abuse of discretion. *Sweitzer v. Dean*, 118 Idaho 568, 574-75, 798 P.2d 27, 33-34 (1990). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). Although leave to amend pleadings should be freely given when justice requires, the trial judge's discretion is broad and its sound exercise usually depends on the presence or absence of such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to

¹ Sagiao has served his sentence, rendering the Rule 35 motion issue moot.

cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, futility of the amendment, etc. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Although delay alone provides an insufficient ground for denying leave to amend, it is a relevant factor. *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973). Rule 15(b) does not bar amendments which change the cause of action or theory of the case. *Cameron Sales, Inc. v. Klemish*, 93 Idaho 451, 455, 463 P.2d 287, 291 (1970). However, Rule 15(b) is not so broad as to require allowance of all proposed amendments and, when proposed at the conclusion of a party's case, amendments to pleadings are normally intended to correct the theory of an existing claim, not assert new and different claims. *Pickwick Entertainment, Inc. v. Theiringer*, 898 F. Supp. 75, 78 (D. Conn. 1995).

The pro se petition for post-conviction relief, filed February 13, 2003 stated:

6. The Petitioner's Counsel did not file a Direct Appeal from his sentence in which the last determination was the 9th day of January, 2003.

The State, in its answer, admitted this allegation. In his pro se response and objection to the State's answer, Sagiao asserted:

Where a material issue of fact existed regarding whether the convicted defendant ever asked his attorney to appeal and whether the attorney disregarded the alleged repeated requests in derogation of the defendant's rights, the court erred in summarily dismissing the defendant's post-conviction relief insofar as it relates to file (sic) an appeal. [*Flores v. State*, 104 Idaho 191, 652 P2d. 488 (Ct. App. 1983) *Petitioner like Flores did request his attorney to appeal his conviction and also asked him to test the alleged substance before trial.*

(Emphasis added). Sagiao was then appointed counsel. Sagiao, through his counsel, was thereafter twice granted leave to amend, with the second amended petition being filed on January 19, 2006, nearly three years after the filing of the initial application. No claim of ineffective assistance of counsel based upon a failure to file a notice of appeal was pled in either amended petition.

At the evidentiary hearing, in order to accommodate the schedule of Sagiao's criminal trial counsel, the court allowed the State to put its evidence on first so he could testify at the beginning of trial and then be excused. On cross-examination, Sagiao's criminal trial counsel testified that, although the trial was over five years prior, he believed that he had filed an appeal and an I.C.R. 35 motion. Defense counsel then asked the court to take judicial notice of the fact

that neither an appeal nor a Rule 35 motion was filed in the criminal case. After Sagiao's criminal trial counsel was excused, Sagiao testified that he asked his attorney to file an appeal. When asked whether he requested his criminal trial counsel to file a Rule 35 motion, the State objected on relevancy grounds because the application for post-conviction did not include an allegation of ineffective assistance of counsel for a failure to file an appeal or a Rule 35 motion. The State also argued that it would be prejudiced by the insertion of a completely new claim.² The district court stated: "The Court will note that the State objected to allowing testimony with regard to what happened at trial. The Court upheld it to allow the background to be given, not to allow substantive evidence to be given for the purposes of amending the pleadings before the Court and, therefore, I'll deny the motion."

Under the facts of this case, the district court acted within its discretion in denying the motion to amend. This matter was originally filed in February of 2003. The evidentiary hearing was conducted more than four years later in June of 2007. The petition was amended twice in 2006. As demonstrated above, as a pro se litigant, Sagiao raised the issue of his counsel's failure to file a notice of appeal. As a represented litigant, Sagiao withdrew or abandoned the issue, as evidenced by the amended petitions. Moreover, it cannot be said that the motion to amend made at the evidentiary hearing in 2007 was based on newly discovered facts or law, since Sagiao raised the issue in 2003. Sagiao provided no explanation for his handling of the issue in his pleadings and the State was entitled to rely on the abandonment of the claim in the amended petitions. In addition, as urged by the State in arguing prejudice, the claim sought to be added was not intended to correct the theory of an existing claim, but to add an entirely new and separate claim, based upon facts and circumstances independent of the pled and tried claims. This Court has held that each allegation of conduct constituting ineffective assistance of counsel is a separate and distinct claim and should be so pled. *Monahan v. State*, 145 Idaho 872, 877 n.2, 187 P.3d 1247, 1252 n.2 (Ct. App. 2008). The claims raised and tried by Sagiao all related exclusively to pre-trial and trial matters, which are entirely distinct from the facts and circumstances relating the failure to file a notice of appeal. The district court correctly concluded that the evidence was irrelevant to the existing claims and admitted only for

² Counsel for the State started to add to this argument, but the court interjected with its ruling.

background purposes. Under these facts, the district court did not abuse its discretion in denying the motion to amend.

III.

CONCLUSION

The district court did not abuse its discretion by denying the motion to amend. Accordingly, the district court's order denying Sagiao's motion to amend to assert a claim of ineffective assistance of counsel for failing to file a notice of appeal is affirmed.

Chief Judge LANSING and Judge PERRY, **CONCUR.**